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United Nations Commission on International Trade Law
Forty-fifth session

Summary record of the 935th meeting
Held at Headquarters, New York, on Monday, 25 June 2012, at 10.30 a.m.

Temporary Chair: Mr. Sorieul (Secretary of the Commission)
Chair: Mr. Sikirić. . . . . (Croatia)
later: Mr. Wiwen-Nilsson (Vice-Chair, Chair of Working Group I). . . . . (Sweden)

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The meeting was called to order at 10.50 a.m.

Opening of the session

1. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, Legal Counsel), noting that the Commission would be finalizing and adopting at the current session the Guide to Enactment of the new UNCITRAL Model Law on Public Procurement, said that a modern public procurement regime helped States to ensure fairness, transparency and efficiency in their processes for making contracts, often involving substantial amounts of public funds. It also set standards to avoid corruption in public finance, which was a concern for contracting parties and international donors, as reflected in the United Nations Convention against Corruption. Indeed the UNCITRAL Model Law was an important tool for the effective implementation of that Convention.

2. Since the previous session, the Regional Centre for Asia and the Pacific had been opened with the support of the Government of the Republic of Korea. The Centre was an important means of promoting the adoption and use of the Commission's texts. It was to be hoped that UNCITRAL would expand its field presence to other regions in the future. On the related subject of technical assistance, the Commission would be taking up a document on a strategic direction for UNCITRAL with a view to optimizing the use of resources and expanding the role of the Working Groups and the UNCITRAL secretariat in promoting the Commission's work.

3. Other matters with which the Commission would deal included arbitration rules, future work on procurement and infrastructure development, legal issues that had an impact on microfinance, and international contract law.

4. In the larger context of United Nations activities related to the rule of law, work was progressing to increase awareness of the Commission's crucial work to address commercial law aspects of migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources. The Commission's work would be taken into account at the high-level meeting of the General Assembly on the rule of law at the national and international levels that would be held later in the year.

5. The Commission's work advanced the values of the Charter of the United Nations, thereby helping to bring about a fair and inclusive global economy.

Election of officers

6. **The Temporary Chair** said that in a letter, Belarus, on behalf of the Eastern European States, had nominated Mr. Sikirić of Croatia to chair the session.

7. *Mr. Sikirić (Croatia) was elected Chair by acclamation.*

8. *Mr. Sikirić (Croatia) took the Chair.*

9. **Mr. Sorieul** (Secretary of the Commission) asked representatives of other groups to inform the secretariat of their nominations before the end of the week. A rapporteur must be elected that same week, to introduce the part of the report on procurement, before consideration of the matter on the Friday.

10. **Mr. Fruhmann** (Austria), speaking on behalf of the Western European and other States, proposed that Mr. Wiwen-Nilsson (Sweden) be elected Vice-Chair of the Commission in his personal capacity.

11. **Mr. Grand d'Esnon** (France) endorsed the nomination.

12. *Mr. Wiwen-Nilsson (Sweden) was elected Vice-Chair of the Commission, in his personal capacity, by acclamation.*

Adoption of the agenda (A/CN.9/735 and Add.1)

13. **The Chair** said that he took it that the Commission agreed to add a new item, following item 12 of the provisional agenda (A/CN.9/735 and Add.1), entitled "Possible future work in the area of international contract law", as proposed by Switzerland. The subsequent items would be renumbered in consequence.

14. *It was so decided.*

15. *The agenda, as amended, was adopted.*

Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WGI/WP.79 and Add. 1-19; A/CN.9/745; A/CN.9/754 and Add.1-3)

16. **The Chair** said that, in accordance with established practice and in the interest of efficiency, the discussion of agenda items relating to the finalization or adoption of draft texts referred to the Commission by a Working Group would be presided over by the Chair of that Working Group.

17. *Mr. Wiwen-Nilsson (Sweden), Vice-Chair, Chair of Working Group I, took the Chair.*

18. **The Chair** said that the draft Guide to Enactment was much more than information related to enactment: it contained recommendations for legislators and an explanation of the differences between the new Model Law and that of 1994 so that States that adopted the new Law could assess the new parts and consider which, if any, to use. He invited members of the Commission to comment on document A/CN.9/WG.I/WP.79 and its addenda.

19. **Ms. Nicholas** (Secretariat), responding to comments by **Mr. Grand d'Esnon** (France), **Ms. Miller** (World Bank) and **Mr. Wallace** (United States of America), explained that changes made to the draft Guide by the Working Group at its meeting in April would be brought to the attention of the Commission as those portions of text were discussed.

20. **The Chair** drew attention to the very good definition of information integrity in paragraph 48 of document A/CN.9/WG.I/WP.79/Add.1.

21. **Ms. Nicholas** (Secretariat) said that the Working Group had proposed a number of changes to paragraphs 16 to 19 of document A/CN.9/WG.I/WP.79/Add.2 on promoting competition among suppliers and contractors for the supply of the subject matter of the procurement. They included deleting the second sentence in paragraph 16, as it would be explained elsewhere in the Guide that collusion was not merely the absence of competition, but was in fact any means used to distort the market; including "among other things" at the end of the second sentence of paragraph 17; and inserting paragraph 18 after paragraph 16, thus the current paragraph 18 would become paragraph 17 and paragraph 17 would become paragraph 18, in order to give better context to article 28 (2) of the Model Law, which was a key application of the principle of competition as set out in the preamble. It would also place more emphasis on the quantitative, rather than the qualitative, elements of competition, as in a restricted market there simply was not the same number of participants as in a more vibrant market.

22. **Mr. Imbachi Cerón** (Colombia) asked where the reference to collusion would appear in the Guide, as that was a concept that was of particular interest to legislators in his country.

The meeting was suspended at 12.05 p.m. and resumed at 12.30 p.m.

23. **The Chair** said that an explanation of collusion appeared in footnote 1 of A/CN.9/WG.I/WP.79/Add.13. It was proposed that the text be moved into the main body of the document, possibly by inserting a new paragraph 20 into A/CN.9/WG.I/WP.79/Add.2.

24. **Ms. Nicholas** (Secretariat) said that the Working Group had been concerned that the definition of collusion that appeared in previous texts was too restrictive, implying that competition was the antithesis of collusion. The broader definition, to be placed at the end of subsection 3 of addendum 2, would also be cross-referenced where appropriate.

25. **Mr. Wallace** (United States of America) and **Mr. Maradiaga** (Honduras) agreed that it would be useful to integrate the definition into paragraph 19 to improve understanding.

26. **Mr. Fruhmann** (Austria), supported by **Mr. Imbachi Cerón** (Colombia), agreed that it was important to have a broader definition of collusion, but said that it should be expanded further to cover representatives of the procurement entity or contracting authority, who may collude with suppliers or contractors. He noted that the aim of collusion was not always to get a higher price; it could be used to modify or distort the terms of procurement contracts to the benefit of suppliers or contractors.

27. **Mr. Zhao** (China) said that a procurement competition might be restricted as a result of ignorance or lack of understanding on the part of the procurement agency, rather than collusion, it was therefore important to ascertain whether those competing for a procurement contract had indeed colluded by establishing what the participants' intention was, whether the procurement agency or the supplier benefited from the terms of the contract and finally whether any laws or legal norms had been violated.

28. **Ms. LeBlanc** (Canada) said that it was not enough to say that collusion was a broader concept than the absence of competition, which her Government considered to be two different things. An absence of competition might imply collusion, but it might not be the only reason why there was no competition. Similarly, there might appear to be competition, but all or some of the bidders could have colluded with each other.

29. **Mr. Wallace** (United States of America) considered that it would be more relevant to insert the explanation of collusion under subsection 5 on promoting the integrity of, and fairness and public confidence in, the procurement process. The Working Group, of which he was a member, had been conscious of the importance of the issue of collusion but had considered that it was better addressed at length in texts pertaining to anti-corruption legislation.

30. **Mr. Imbachi Cerón** (Colombia) said that as the draft Guide sought to provide guidance to States on how to foster free market conditions it was important to include general definitions of such issues.

31. **The Chair** said that the secretariat would produce a final version of the text for consideration by the Commission. He considered that it was important to expand the reference to collusion in paragraph 16, rather than removing it altogether and moving it down to subsection 5.

32. **Ms. Nicholas** (Secretariat) said that the definition would be sufficiently well-rounded, developed and cross-referenced so that the relevance and importance of the issue would be clear.

The meeting rose at 1 p.m.